SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 141

THE CONFEDERATED BANDS OF UTE INDIANS,
Petitioners,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR PETITIONERS

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Opinions Below

The opinions of the Court of Claims (R. 24-38) are reported in 64 F. Supp. 569.

Jurisdiction

The judgment of the Court of Claims was entered March 4, 1946 (R. 38). This Court granted the writ of certiorari on October 14, 1946 (R. 38). The jurisdiction of this Court is invoked under § 3(b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 28 U. S. C. § 288, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752.

The special jurisdictional act under which this case was instituted in the court below was the Act of June 28, 1938, c. 776, 52 Stat. 1209 (R. 5), as amended by the Acts of July 15, 1941, c. 299, 55 Stat. 593 (R. 10), June 22, 1943, c. 135, 57 Stat. 160. It was again amended by Act of June 11, 1946, c. 378, 60 Stat. —. The jurisdictional act contains no special provision for review on appeal to this Court. The provision of the Act of February 13, 1925, above, governing this Court's review of cases in the Court of Claims (28 U. S. C. § 288), under which this Court is authorized to review "*any case* in the Court of Claims", confers jurisdiction on this Court to review this case. *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 202-203, and notes 3 and 4; *Shoshone Indians* v. *United States*, 324 U. S. 335, 337.

Questions Presented

1. A tribe of Indians ceded their reservation to the United States as trustee, the lands to be sold for their benefit. To the knowledge of the United States, the Indians understood the cession in trust as encompassing lands which at the time of the cession were a part of their reservation pursuant to an Executive order which had been proclaimed to settle a dispute between the Indians and the United States as to the territory reserved to the Indians by an earlier treaty with the United States. Is the United States liable for taking the Executive-order lands to its own use and profit, instead of selling them for the benefit of the Indians under the agreement?

Where a tribe of Indians reasonably understands its agreement with the United States in one way, and the United States understands it differently, which understanding shall prevail?

2. Whether the Act of June 15, 1880, constituting an agreement between petitioners and respondent, has been properly construed.

3. Whether *Sioux Tribe* v. *United States*, 316 U. S. 317, permits the United States to take without compensation lands added to their reservation by an Executive order in settlement of a boundary dispute where the Indians held the Executive order lands as a part of their entire reservation and made a formal cession of all their lands in trust to the United States for their own account.

Treaties, Agreements, Executive Orders and Statutes Involved

The material portions of treaties, agreements, Executive orders and statutes involved are quoted by the court below (R. 11-27) and in the statement, *post*.

Statement

Summary Statement.—This is a suit to recover for the taking of lands belonging to petitioners. In 1868 the parties entered into a treaty by which petitioners, after ceding a large area of their land, reserved certain areas in western Colorado for their own use. The northern boundary line of the land thus reserved was not located by any survey until 1875. This survey disclosed what both parties believed to be a mistake as to the location of that boundary, both parties having understood it to lie farther north. To eliminate the serious dissatisfaction of the Indians and settle the matter, the President, in 1875, promulgated an Executive order, adding to the northern end of the existing reservation a strip of land about nine miles wide. Later when whites threatened to move onto this strip under claim that the survey was erroneous, the Indians were assured it was validly a part of their reservation. In 1880, by agreement ratified by Congress and by petitioners, it was agreed petitioners would give up their "present reservation" (which included the strip of land added by the Executive order), in return for which the United States agreed, among other things, to

sell the lands to which the United States thereby acquired title, reimburse itself for expenses and advances, and pay the balance of the proceeds to petitioners. Petitioner Indians understood that this sale included all the lands of their reservation, including the lands which some four or five years previously had been added by the Executive order of 1875. Nevertheless, respondent by an Executive order of August 4, 1882, restored this strip of land to the public domain, and instead of accounting to petitioners for the proceeds of sale, has retained such proceeds for its own account, treating itself as the proprietor of the lands and without regard to its trusteeship for petitioners under its Agreement of 1880.

The Court of Claims held (R. 27-28) that petitioners did not have technical title to the lands added by the Executive order and that respondent did not therefore undertake to sell such lands for the account and benefit of petitioners.

Detailed Statement.—By Treaty of March 2, 1868, 15 Stat. 619, 2 Kappler 990, petitioners ceded (Art. III) all claim to their lands in the United States in exchange for the reservation for their benefit (Art. II) in Colorado, of a part of their original country. This reservation was bounded on the east by the 107th meridian, on the south and west by the southern and western boundaries of Colorado, and on the north by a line 15 miles north of the 40th parallel of north latitude. Finding 3, R. 12. As contrasted with their original country, which they had to protect themselves, the United States "solemnly agreed" to protect them in the "absolute and undisturbed use and occupation" of their new reservation, and warranted that "no persons • • • except • • • officers, agents and employees of the Government • • • shall ever be permitted to pass over, settle upon, or reside" thereon. (Art. 1.). The United States also (Art. IV) agreed to establish two agencies

"on the reservation," one of which, material in the present case, was to be on White River. Finding 5, R. 13.

The White River Agency was established during the latter part of 1869 at a place considered favorable for agency purposes, which was thought by the government and Indians alike to be south of the northern boundary line. Finding 5, R. 13.

The Indians believed that their reservation encompassed lands considerably to the north of the agency; for they ordered miners on Douglass Creek [Wyoming], fifty miles north of the reservation, off their lands and complained of a proposed wagon road in the Bear [now Yampa] River Valley in northern Colorado on their understanding that the valley was in their country. The agent at the White River Agency persistently requested a survey of the northern boundary in order to set the matter at rest. He reported that if he had "talked a minute" he had talked "a hundred hours" on the subject but could get no concession from them that the country above referred to did not belong to them. Finding 6, R. 15.

The uncertain location of the northern boundary line provided for by the Treaty of 1868 is further revealed by the fact, reported by Commissioner Manypenny (*Our Indian Wards* [1880], p. 401) that petitioners, at the time of the location of the northern agency on the White River, wanted it located on the Bear (now Yampa) River. And Governor Edward M. Cook of Colorado, ex-officio Superintendent of Indian Affairs, as late as September 1, 1870, reported (Report, Commr. Ind. Affairs, 1870, quoted in the Report of the Secty. Interior, 1870-71, p. 632, 633-634) that, after visiting the White River Agency, "My impression is that the proper location for this agency would have been on the south bank of Bear River, about 80 miles north of its present site", and that "The Indians themselves desired the agency established at the point • • •". When

surveys were ultimately made, the Bear River turned out to be north of the northern boundary of petitioners' reservation.

In October or November of 1875—more than seven years after the treaty—the northern bounadry was eventually surveyed. The survey established the north boundary of the reservation to be apparently at a location south of where defendant's agents had thought, and far south of where the Indians had thought the line ran. Finding 7, R. 16-17. Upon information of these facts being communicated to Washington, the Commissioner of Indian Affairs (Finding 8, R. 19) and the Secretary of the Interior (Finding 9, R. 19) recommended the adoption of an Executive order adding a strip of land [about nine miles in width] to the northern end of petitioners' reservation. The Executive order was promulgated by the President on November 22, 1875 (1 Kappler 834). By it this strip was "set apart for the use of the several tribes of Ute Indians, as an addition to their present reservation" in Colorado. Finding 10, R. 19-20.

The agent at White River in being informed of the Executive order, was assured that it "fully protects your Indians in the peaceable possession of their improvements in the White River Valley and the Agency buildings," and would enable him to "assure the Indians of the exact location of the limits of their reservation as enlarged." Finding 11, R. 20. Accordingly, after petitioners were advised of the adoption of the Executive order in 1875, it was understood by them, just as it was understood by respondent, that the lands added by the Executive order and which both parties had understood were meant to be encompassed by the reservation in the 1868 Treaty (Finding 7, R. 16-17), were part of petitioners' reservation.

Two years later, in 1877, when the accuracy of the 1875 survey was questioned and white persons were threatening to settle and prospect for gold on the land located north

of the 1875 survey, the Indian Agent wrote Washington as to whether he would be supported if he removed persons coming on the reserve. S. Exec. Doc. No. 29, 46th Cong., 2d Sess., p. 41. In response thereto he was advised that the right of the Indians to exclusive possession of their reservation, as enlarged by the Executive order, was not affected by the accuracy of the 1875 survey; that the question of the Indians' right to exclusively occupy this land was "settled" by the Executive order of 1875; "that any person settling upon lands in Colorado south" of the northern boundary of the Executive order strip "is there in violation of law, and subject to removal under Sections 2147 to 2151 [Title 25 U. S. C., §§ 220-224], both inclusive, of the Revised Statutes". *Id.*, p. 42. The sections of the Revised Statutes referred to provide criminal penalties for trespass on Indian reservations and authorize the use of military authority to remove persons from these reservations.

Later that same year the Indian Agent reported that whites were depriving the Indians of their lands, and that "From what I see of the disposition and wishes of the white people in the neighborhood of the northern portion of the reservation, they would gladly deprive the Utes of this country . . . ." He reported different colonization plans to settle on the Ute reservation, S. Exec. Doc. No. 29, 46th Cong., 2d Sess., p. 43. In response thereto, the Commissioner of Indian Affairs recommended to the Secretary of Interior that "the General Land Office be directed to instruct the register and receiver of the proper district to give public notice that all lands withdrawn by said Executive order are reserved as Indian lands, and are not, therefore, regarded as a part of the public domain for any purpose whatever, and that white settlers thereon are trespassers, and will be removed by the governmnt, with the aid of the military, if necessary." *Id.*, p. 44. He recommended that "a military force be sent to the White River Valley.

to insure the faithful observance of the treaty stipulations with the Utes, by removing and keeping away from their reservation all unauthorized persons." *Id.*, p. 44-45.

The pressure of those on the frontier to seize the Ute lands, guaranteed, as hereinbefore stated by the Treaty of 1868 and the Executive order of 1875, was gradually intensified. In September of 1879, there occurred what the Indians understood to be undeclared warfare upon them by respondent, leading to the Meeker Massacre in the northern part of the Reservation, in which the Indian Agent and all the agency's male employees and others were killed by certain White River Utes (R. 25). (See discussion in the argument, *post.*)

To prevent further warfare and to initiate a transfer of the Ute lands in Colorado to respondent [1] the Chiefs and headmen of the Tribe were summoned to Washington, where, on March 6, 1880, they entered into an agreement with respondent whereby they promised "to use their best endeavors with their people to procure their consent to cede to the United States *all of the territory of the present Ute Reservation* in Colorado" after first providing for individual allotments to the members of petitioner bands (21 Stat. 200). Congress thereupon passed an act (Act of June 15, 1880, c. 223, 21 Stat. 199, 1 Kappler 180) which (1) by its

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[1] Secretary of Interior Carl Schurz justified the agreement on the ground that it was the only alternative short of war with the Utes. In testifying before the House Committee on Indian Affairs he stated: (Report No. 1461, House of Representatives, 46th Cong. 2nd Sess. p. 2.)

> "A war in those mountains at that season, and I am stating this upon the authority of military officers with whom I conversed upon the subject, would have brought us a winter campaign likely to cost from ten to fifteen million dollars and a very considerable number of men and officers."

He further reported that while Senator Hill of Colorado thought the agreement with the chiefs and headmen would be satisfactory to his people, Senator Teller, also of Colorado, took the position that "it would not be satisfactory to him unless every Ute left Colorado" (*Id.*, p. 7).

preamble recited that the "chiefs and headmen" had "submitted to the Secretary of Interior an agreement for the sale to the United States of their *present reservation* in the State of Colorado", (2) incorporated as a part of its provisions the agreement of said "chiefs and headmen" to "use their best endeavors with their people to procure their consent *to cede* to the United States *all of the territory of the present Ute Reservation* in Colorado", and (3) after providing that certain allotments in severalty should be made to plaintiffs, specified by Section 3 that "*all the lands not so allotted,* the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands," the proceeds of such sales, after the payment of certain expenses, to be used for the benefit of petitioners. This statutory scheme for the cession and sale of all of petitioners' "*present* reservation" was conditioned upon acceptance of the statutory terms by petitioners. Petitioners ratified the statute, which accordingly became an agreement between petitioners and respondent. Finding 12, R. 20-22.

Subsequently, the lands to be allotted to the individuals not having been selected, doubts existed whether settlers could make entry of the lands in the former reservation in Colorado. To remove these doubts, Congress declared by the Act of July 28, 1882, c. 357, 22 Stat. 178, 1 Kappler 205, that the lands formerly occupied by petitioner bands other than those set apart for the Southern Utes by the Agreement of 1880, were "public lands of the United States," subject to disposal in accordance with the agreement of 1880. Finding 13, R. 22. No sooner had this act been approved than the Commissioner of Indian Affairs (on August 2, 1882) recommended that the lands described in the Exec-

utive order of 1875, and which formed a part of the reservation as ceded under the 1880 agreement and were made "public lands of the United States" by the statute of 1882, be restored to the public domain. Finding 14, R. 22-23. Thereupon, the President, by Executive order of August 4, 1882, 1 Kappler 834, ordered that the land so set apart and so recognized by the Acts of Congress of June 15, 1880, 21 Stat. 199, and July 28, 1882, 22 Stat. 178, as part of petitioners' reservation, "be, and the same hereby is restored to the public domain." Finding 15, R. 23.

The United States has failed completely in its obligation to hold and sell these lands for the benefit of petitioners. It restored them to the public domain, and thereafter deposited the moneys from sales thereof to its own use and account in Treasury; and it has neither credited such moneys, nor accounted for them, to plaintiffs. Finding 16, R. 23.[2]

This suit was instituted pursuant to a special jurisdictional act approved June 28, 1938, c. 776, 52 Stat. 1209, as amended by the Acts of July 15, 1941, c. 299, 55 Stat. 593, and June 22, 1943, c. 135, 57 Stat. 160. This act authorized a suit or suits in the court below by the Ute Indians or any tribe or band thereof on all legal and equitable claims of whatsoever nature—

> "including, but without limiting the generality of the foregoing, claims arising under or growing out of any treaty or agreement of the United States, law of Congress, Executive order, or by reason of any lands taken from them, without compensation, or for the fail-

[2] Previously, under a jurisdictional act of March 3, 1909, c. 263, 35 Stat. 781, 788-789, petitioners brought suit against the United States for sales of the ceded lands pursuant to the Agreement of 1880 up to that time; and they ultimately recovered a judgment for the proceeds of cash sales and land reserved for public uses, less offsets and deductions up to July 1, 1910. This recovery did not, however, include the sale of lands added to the reservation by the Executive order of November 22, 1875, with which this case is concerned. Finding 17, R. 23-24.

> ure or refusal of the United States to protect the interest of any of said bands in lands (as to which any of said bands had the possessory right of use and occupancy), or because of any mismanagement or wrongful handling of any of the funds, land, property, or business enterprises belonging to or held in trust for any of said bands by the United States, or any misfeasance or nonfeasance on the part of the United States with respect thereto, or otherwise."

By § 3 of this jurisdictional act, it is provided that at the trial of any suit instituted thereunder, the court shall apply as respects the United States "the same principles of law as would be applied to an ordinary fiduciary"; and that "in the determination of the validity of any claim asserted or defense interposed hereunder, the Court shall have the full power and authority of a court of equity".

By § 6, it was provided:

> "If the court shall find that any lands formerly belonging to the said bands of Ute Indians or any of them, have been taken by the United States without compensation therefor and set apart and reserved as national reservations or for other public uses or otherwise classified, reserved, or withdrawn from entry and sale under the public land laws or disposed of in any manner whereby the said Indians have been deprived of the use or benefits of such lands and the natural resources thereof, it is hereby declared that such action shall be sufficient grounds for equitable relief and the court shall render judgment in favor of said Indians, and shall award to them, as for a taking under the power of eminent domain, compensation for all such lands and natural resources * * *."

The Court of Claims dismissed the petition (R. 24). It correctly stated that the question presented was whether there was included in the 1880 agreement, for sale by respondent for petitioners' benefit, the lands which had been

added to the reservation by the 1875 Executive order. But it nevertheless held that while "when these chiefs and headmen entered into the agreement ratified by the Act of June 15, 1880, they no doubt believed that they were ceding to the United States these lands as well as others" (R. 26), still, the United States undertook to sell only "all the lands not * * * allotted [to the Indians], the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States * * *." It therefore regarded as the controlling issue whether the Indians had strict title to the lands by virtue of the Executive order. It thought it plain (although it found no evidence beyond the terms of the agreement of 1880 itself on which to base its conclusion) that Congress was "careful to limit its agreement to sell for the Indians' account those lands to which the Indians had title" and that Congress did not mean to ratify and confirm the President's action in setting apart these lands as an addition to the 1868 reservation (R. 28). It thought the action of the Commissioner of Indian Affairs and the Secretary of the Interior in recommending the Executive order of 1882 by which the lands were taken from petitioners (of which complaint is here made) to be administrative construction showing respondent's ownership of the land (R. 27-29).

Judge Littleton concurred in a separate opinion. R. 28.

Specification of Errors to Be Urged

The court erred:

1. In holding that the Executive order of November 22, 1875, did not recognize and settle between petitioners and respondent the title of petitioners reserved in their lands in Colorado under the Treaty of March 2, 1868.

2. In holding that petitioners did not acquire title to the lands described in the Executive order of November 22, 1875, either by the terms of that order or under the Treaty of March 2, 1868.

3. In holding that under the agreement ratified by Congress by Act of June 15, 1880, the United States did not undertake and agree to hold the lands described in the Executive order of 1875 for sale for petitioners' benefit.

4. In holding that by the Act of June 15, 1880, ratified by petitioners, the Executive order of 1875 was not ratified and confirmed as having vested petitioners with title to the lands therein described.

5. In failing to hold that petitioners are entitled to recover.

Summary of Argument

1. In the agreement between petitioners and respondent in 1880, petitioner Indians understood they owned and were ceding to the United States in trust for their own benefit the lands added to their reservation by Executive order of 1875. Respondent knew of this understanding of petitioners. Even were it true that respondent had a contrary undisclosed understanding of the agreement, this Court's decisions require that the understanding of the Indians must prevail. Were any other rule applied to the case at bar, it would sanction a fraud upon petitioners, who are wards of respondent. Respondent had exclusive control of the drafting of the agreement, and doubts must, therefore, be resolved against respondent. Respondent may not profit at its wards' expense from its own silence, where it knew of petitioners' understanding.

2. But it is not true that the parties could have had contrary understandings; the agreement is susceptible only

of the interpretation which petitioners placed upon it at the time. The court below in interpreting § 3 of the Act of 1880 (the agreement), which provided that "all the lands not • • • [individually] allotted, the title to which is by this agreement • • • released and conveyed to the United States" should be sold and the proceeds held in trust for petitioners, isolated the word "title" and gave it an unwarranted technical interpretation. Based on that narrow interpretation the court concluded that an Executive order could not have established a title in petitioners which could be released and conveyed to respondent. The fact is that that phrase was merely a convenient means for the draftsman to use in referring to the net lands conveyed. Contemporary maps showed that the Ute Reservation at that time included, without differentiation from the rest of Plaintiffs' reservation, the lands added by the Executive order. The law of the day indicated that the title of the Indians was not different, whether the lands were held under treaty, agreement, or Executive order. And there is no basis for supposition that the United States felt the petitioners were not conveying these lands as well as others.

Sioux Tribe v. *United States*, 316 U. S. 317, is not authority to the contrary. In that case, there was no intent to settle any dispute with the Indians, vest any title in them, or serve any other purpose than a transitory law-enforcement function of the government. Here it was intended that the lands would be incorporated in and have the same status as the other land already encompassed within the treaty boundaries. Congress accepted this view of the Act of 1880; and the Act of 1882 (which preserved petitioners' rights in the proceeds of the lands under the 1880 Agreement) was deemed necessary to open these lands to entry and sale.

Nor is it true that the "Meeker Massacre" in 1879 had resulted in such vindictive or vengeful attitude on the part

of Congress that it could not have meant for petitioners to have the benefit of the sales of the Executive-order lands. Were that true, § 3 of the Act of 1880 would never have been agreed to by respondent with respect to any of the lands; and the incident can only confirm that Congress intended to acquire the Executive order as well as other lands. Furthermore, the Meeker Massacre itself was (and was so recognized by many at the time) an act of justifiable warfare on the part of petitioners, following the unexplained march of their settlements by the United States Army in violation of the treaty with petitioners.

Argument

1. At the time the agreement of 1880 was entered into, the Indians understood that they owned the lands which were described in the Executive order of 1875.[3] In the

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[3] Article II of the Treaty of 1868 had reserved to petitioners that part of their former lands which was described as bounded on the east by the 107th meridian, on the south and west by the southern and western boundaries of Colorado, and on the north by a line 15 miles north of the 40th parallel of north latitude. This survey jargon was of course unintelligible to the Indians, all of whom were illiterate and who could sign only by mark (Treaty of 1868, 15 Stat. 619, 623, 2 Kappler 990, 993), and who knew the location of their reserved country by natural landmarks rather than by the white man's technology. The matter of unsurveyed boundaries had plagued Indians and the Executive alike from the time of the 1868 Treaty. Thus, Commissioner Manypenny (*Our Indian Wards* [1880], final chapter) relates that when the survey of the east boundary of the reservation (the 107° of west longitude) was made, it fell farther west than the line pointed out to the Indians when the treaty was made, notwithstanding which the reservation in western Colorado as it was excited the cupidity of white settlers and prospectors. This led ultimately to the purchase from petitioners by respondent in 1873 of a large tract in the principal mining region, through the Brunot Agreement ratified by Act of April 29, 1874, c. 136, 18 Stat. 36, 1 Kappler 151. It was in the transactions of Mr. Brunot, as Commissioner for the United States, that Mr. Brunot stated to petitioners that if there were mines in the area, the United States could not stop the Americans from going on the Ute lands—which inspired the famous remark of Chief Ouray, "Why can not you

words of the Court of Claims (R. 26) the Indians "in all probability believed that they were as much a part of their reservation as were the lands set aside by the Treaty of March 2, 1868." And they understood that these lands, as well as the other lands in their reservation, were a part of the lands they were ceding to the United States in trust, to be sold for their benefit.[4] In the words of the Court of Claims (R. 26), "they no doubt believed that they were ceding to the United States these lands as well as others". Not only that, but the United States knew the understanding of the Indians; it was acquainted with their

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stop them; *is not the Government strong enough to keep its agreements with us?*" (Italics added.)

And yet the northern boundary remained unsurveyed until two years after that. Petitioners believed that the land which they had kept extended as far north as Douglass Creek in Wyoming, which was 50 miles north of the reservation line, and also included the Bear River Valley, which was substantially north of the northern boundary as described in the treaty. Finding 6, R. 13-15. And when the 1875 survey showed their northern boundary to be apparently even south of the agency buildings, consternation set in. They knew that to settle this dispute and to appease them, the President—their Great White Father—had confirmed by Executive order their ownership of some of the lands they already understood they owned. Presumably the Indian Agent, pursuant to instructions, had assured them of "the exact location of the limits of their reservation as enlarged." Finding 11, R. 20. They undoubtedly knew that their agent had been informed that whites had no more right to enter or settle on the Executive order land than on their other land. When, therefore, some of their chiefs and headmen agreed, by the preliminary agreement of 1880 to "use their best endeavors with their people to procure their consent to cede * * * all the territory of the *present Ute Reservation*", petitioners believed, as admitted by the court below (R. 26), "that they [the Executive order lands] were as much a part of their reservation as were the lands set aside by the treaty of March 2, 1868."

[4] The chiefs and headmen agreed to attempt to persuade their people "to cede * * * all of * * * the present Ute Reservation." R. 26. The only thing reserved to petitioners was the right to individual allotments. Since no reservation was made of the executive order lands "they no doubt believed" as again admitted by the Court of Claims "that they were ceding to the United States these lands as well as the others" (R. 26). They were concerned with the realities of the moment—in which it made no difference whether their possession of this part of their

intent. The court below acknowledged (R. 28), "Congress knew they [petitioners] probably considered these Executive Order lands a part of their 'present reservation' "—the term "present reservation" being the language used in the preliminary agreement of some of the chiefs and headmen of petitioners, signed March 6, 1880, and set forth in the act of June 15, 1880, which act itself became the agreement between the parties upon ratification by petitioners.

In this situation—where the Indians understood both that they owned these Executive-order lands and that by the agreement of 1880 they were ceding them to the United States in trust, and this understanding was known to respondent—the opinions of this Court require that the understanding of the Indians will prevail—even assuming (which is not admitted) that respondent had a contrary undisclosed understanding. This Court has held flatly that a "treaty must • • • be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones* v. *Meehan*, 175 U. S. 1, 11-12; *Choate* v. *Trapp*, 224 U. S. 665, 675; *Starr* v. *Long Jim*, 227 U. S. 613, 622-623; *Marlin* v. *Lewallen*, 276 U. S. 58, 64. "How

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original country was recognized by respondent by treaty or by Executive order—and knew of no difference in qualities of ownership and certainly had no power to divine that some 62 years later a court would draw some esoteric distinction between the quality of ownership in that part of their land described in the treaty and that part described in the Executive order. (See *Sioux Tribe of Indians* v. *United States*, 316 U. S. 317.) Even if they had consulted the legal authorities of the time, which in their ignorance they could not, they would probably have been informed, as this Court soon thereafter held, that "When Indian reservations were created, either by treaty or Executive order, the Indians held the land by the same character of *title*, to wit, the right to possess and occupy the lands for the uses and purposes designated." (Italics added.) *Spaulding* v. *Chandler*, 160 U. S. 394, 403; see also *Ex parte Wilson*, 140 U. S. 575, 577. And see discussion, *post*.

the words of the treaty were understood by this unlettered people, * * * should form the rule of construction." *Worcester* v. *Georgia*, 6 Pet. 515, 582; *Choctaw Nation* v. *United States*, 119 U. S. 1, 27, 28. "And we have said that we will construe a treaty with the Indians as 'that unlettered people' understood it, * * *." *United States* v. *Winans*, 198 U. S. 371, 380. *Northern P. R. Co.* v. *United States*, 227 U. S. 355, 366-367; *Seufert Bros.* v. *United States*, 249 U. S. 194, 198. Treaties "are to be construed in the sense in which naturally the Indians would understand them." *United States* v. *Shoshone Tribe*, 304 U. S. 111, 116. "It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives * * *." *Tulee* v. *Washington*, 315 U. S. 681, 684-685. This doctrine of construction applies to agreements made with the Indians since March 3, 1871, under R. S. § 2079 (25 U. S. C. § 71), equally with treaties made prior to that date. *Marlin* v. *Lewallen*, 276 U. S. 58, 64.

The theory of the court below is based upon the view that the United States had the understanding (contrary to that of petitioners) that the lands in question were not to be held for sale in trust. This is inferred from a very critical interpretation of the word "title" in § 3 of the Act of 1880.[5]

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[5] Section 3 of the Act of 1880 (R. 21) provided that lands for settlement of the Indians in severalty should be surveyed; an allotment should be made to each of the Indians; and a patent should be issued, and then provided (italics added)—

"* * * all the lands not so allotted, *the title to which is*, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, *released and conveyed to the United States*, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for

The Court of Claims reasoned (R. 27) that under this section, it will

> "* * * be seen that the United States agreed to sell for the account of the Indians only those unallotted lands 'the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States'. This did not include the lands added to the reservation by Executive Order because the Indians did not have title to these lands and, hence, title to them was not conveyed by the agreement referred to."

As we point out below, it is difficult to see how even a white-man's court could distinguish between the estate which the Indians had in the Executive order lands and "title" as used in § 3 of the 1880 Agreement. *A fortiori* it cannot conceivably be supposed that Indians who signed by mark (Treaty of March 2, 1868, 15 Stat. 619, 623, 2 Kappler 990; preliminary agreement ratified by Act of June 15, 1880, 21 Stat. 199, 202, 1 Kappler 180) could be expected so to construe the word "title." Some 114 years ago this Court was urged to make a similar fine distinction between the technical words "allotted" and "marked out". But

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the disposal of the public lands, at the same price and on the same terms as other lands of like character, except as provided in this act: *Provided*, That none of said lands, whether mineral or otherwise, shall be liable to entry and settlement under the provisions of the homestead law; but shall be subject to cash entry only in accordance with existing law; and when sold the proceeds of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the government for the benefit of said Indians, and then to be applied in payment for the lands at one dollar and twenty-five cents per acre which may be ceded to them by the United States outside of their reservation, in pursuance of this agreement. And the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians, in the proportion hereinbefore stated, and the interest thereon shall be distributed annually to them in the same manner as the funds provided for in this act: * * *" (Italics added.)

this Court, through Chief Justice Marshall, refused to draw such distinction to the prejudice of the Indians, and instead ruled that the agreement must be construed as the Indians understood it. *Worcester* v. *Georgia,* 6 Pet. 515, 552, 582. The reasons for construing a treaty or agreement in this way were restated by the Court in *Jones* v. *Meehan,* 175 U. S. 1, 10-12, with reference to the earlier opinion in *Worcester* v. *Georgia,* as follows:

> "In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. *Worcester* v. *Georgia,* 6 Pet. 515; *The Kansas Indians,* 5 Wall. 737, 760; *Choctaw Nation* v. *United States,* 119 U. S. 1, 27, 28. In the leading case of *Worcester* v. *Georgia* (1832), Chief Justice Marshall, speaking of article 4 of treaty of Hopewell of November 28, 1785, between the United States and the Cherokee Indians, which defined 'the boundary allotted to the Cherokees for their hunting grounds, between the said Indians and the citizens of the United States' (7 Stat. 19), said: 'There is the more reason for supposing that the Cherokee chiefs

were not very critical judges of the language; from the fact that everyone makes his mark; no chief was capable of signing his name. It is probable the treaty was interpreted to them.' 'Is it reasonable to suppose that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word "allotted" from the words "marked out"?' 6 Pet. 551, 552. And Mr. Justice McLean, concurring, said: 'The language used in treaties with the Indians should never be construed to their prejudice.' 'To contend that the word "allotted," in reference to the lands guaranteed to the Indians in certain treaties indicates a favor conferred, rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.' 6 Pet. 582."

Any other interpretation would work a fraud on the wards of the Government. Respondent had it clearly within its power to place the matter of the Executive order addition beyond controversy by including or excluding it specifically from the lands to be the subject of the trust. The court below acknowledges (R. 27) that "At the time Congress ratified this agreement, it must have known of the addition to the reservation by Executive Order * * *". In the absence of having plainly excluded it from the land to be sold for petitioners' account, it must be presumed that it is to be included; for respondent had exclusive control of the drafting of the agreement. *Jones* v. *Meehan, supra.* As Williston puts it, "Since one who speaks or writes, can by exactness of expression more easily prevent mistakes in meaning, than one with whom he is dealing, doubts arising from ambiguity of language are resolved in favor of the latter." WILLISTON, Contracts (rev. ed.), § 621, p. 1788. Or as the courts have put it, following Williston's expression

of the principle (*id.*, § 91B, p. 284), "one who keeps silent, knowing that his silence will be misinterpreted, should not be allowed to deny the natural interpretation of his conduct." *Laredo Nat. Bank* v. *Gordon* (C. C. A. 5th), 1932, 61 F. (2d) 906, 907; *Truscon Steel* v. *Cooke* (C. C. A. 10th), 1938, 98 F. (2d) 905, 911.

As a matter of fact, the conduct which the court below attributes to the respondent would amount to fraud, under the tests laid down in the Restatement. AM. L. INST., *Restatement of the Law of Contracts*, vol. 2, §§ 471, 472. That work establishes that unprivileged non-disclosure is fraud, and then rules (§ 472):

> "(1) There is no privilege of non-disclosure, by a party who
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> * * * * * * *
>
> "(b) knows that the other party is acting under a mistake as to undisclosed material facts, and the mistake if mutual would render voidable a transaction caused by relying thereon, or
>
> "(c) occupies such a relation to the other party as to justify the latter in expecting that his interests will be cared for, * * *.
>
> "(2) Where non-disclosure is not privileged it has the effect of a material misrepresentation."

Indeed, one of the illustrations given by the authors of the Restatement to illustrate the principles enunciated in Sec. 472 is strikingly like the case at bar:

> "1. A, in conversation with B, states that A's land Blackacre contains thirty acres. A supposes this statement to be true, and makes it with no expectation of selling the land. Subsequently A discovers that the land contains only twenty-three acres, and after acquiring this knowledge, and having in mind his previous conversation, contracts with B to sell him the land. A's

lack of disclosure is fraud, and it is immaterial that A shows B the boundaries of the land before the contract is made."

2. Leaving to one side the supposed conflict in understanding between the parties, it is not true that respondent understood that the agreement did not convey the Executive order lands. The agreement is not susceptible of the interpretation placed on it below. By the preliminary agreement of March 6, 1880, the "chiefs and headmen" agreed and promised "to use their best endeavors with their people to procure their consent *to cede to the United States all of the territory of the present Ute Reservation* in Colorado" with certain exceptions not here material. 21 Stat. 199, 200. At the time of such agreement the land here in question was a part "of the territory of the *present Ute Reservation* in Colorado", and surely embraced in the above language.

In the final agreement, the Act of June 15, 1880, c. 223, 21 Stat. 199, thereafter (pursuant to § 10, 21 Stat. at p. 205) ratified by petitioners, Congress incorporated the preliminary agreement as well as other provisions. Further, the preamble to said act, as in the case of the incorporated agreement, recited that "certain of the chiefs and headmen of the confederated bands of the Ute tribe of Indians, now present in the city of Washington, have agreed upon and submitted to the Secretary of Interior an agreement for the sale to the United States of *their present reservation in the State of Colorado* * * *." The land in question was then still a part of the Ute reservation and surely embraced in the above language.

The additional provisions of the act, instead of giving any indication of any Congressional intent to depart from this central purpose of the act—to acquire all of the land of the then "present Ute Reservation"—corroborate that

purpose. Thus Section 3 provided that after certain allotments in severalty should be made to plaintiffs

> "*all* the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands * * *." (Italics added.)

The proceeds from this land were to be applied (1) to reimburse the United States for all sums paid out or set apart under the act for the Utes; (2) to pay the United States for land allotted to the Utes outside of their reservation; and (3) to hold the remaining proceeds in trust for the Ute Indians.

In the light of the language of the original agreement, and the preamble to the statute, no significance is to be given to the use of the word "title" appearing in Section 3. It was merely a convenient means of referring to the land embraced within plaintiffs' reservation—phraseology which would be apt to come to the mind of any Anglo-Saxon draftsman. If it had been intended to except the land here in question, it was incumbent on Congress to so state. It did except other land and specifically so stated.[6] A specific exclusion of other land not intended to be ceded shows affirmative intent to include this land.

The court below however seizes upon the phrase "all the lands * * * title to which is, * * * released and conveyed to the United States", and applies it so as to override and supersede all the other provisions of the statute, and to spell out an intent on the part of Congress not to

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[6] The exceptions were "unoccupied agricultural lands on the La Plata River," "agricultural lands on Grand River," etc. (Sec. 1), for individual allotments. By Section 8, the "Uncompahgre Park" was also excepted.

include the Executive-order land. The reasoning of the court below is as follows:

> "The Indians proposed to cede their 'present reservation'; Congress knew they probably considered these Executive Order lands a part of their 'present reservation,' and so it was careful to limit its agreement to sell for the Indians' account those lands to which the Indians had title. It did not mean to ratify and confirm the President's action in setting apart these lands 'as an addition to their present reservation in said Territory,' and it plainly said so."

The 1880 agreement will be read in vain for anything "plainly" stating, or even intimating, that Congress did not mean to ratify the addition of the Executive-order lands. If, as the court concedes, Congress knew the Indians considered these lands to be a part of their reservation, it is not for the courts to impute to Congress, as guardian[7] of these Indians, an intent to cheat them out of these lands by using trick language which the Indians did not understand.

The understanding of persons dealing for respondent could not have been very different from the understanding of the Indians themselves, so far as is concerned the title to the Executive order lands. The Executive order lands

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[7] This Court has long referred to respondent as a "guardian" or "trustee in possession" on behalf of its Indian wards. (*Morrison* v. *Work*, 266 U. S. 481, 485); as one having "fiduciary duties" (*Seminole Nation* v. *United States*, 316 U. S. 286, 295); and as standing in a relationship of guardianship or trust, *The Cherokee Nation* v. *The State of Georgia*, 5 Pet. 1, 17; *United States* v. *Kagama*, 118 U. S. 375; *Choctaw Nation* v. *United States*, 119 U. S. 1; *Jones* v. *Meehan*, 175 U. S. 1, 10; *United States* v. *Pelican*, 232 U. S. 442, 447, 450-451; *United States* v. *Payne*, 264 U. S. 446, 448; *United States* v. *Creek Nation*, 295 U. S. 103, 110; *Tulee* v. *State of Washington*, 315 U. S. 681, 684-685; *Klamath Indians* v. *United States*, 296 U. S. 244, 254.

The Jurisdictional Act in this case (R. 6) specifically provides (§ 3) that at "the trial of any suit instituted hereunder the court shall apply as respects the United States the same principles of law as would be applied to an ordinary fiduciary."

were shown on contemporary maps as a part of the "Ute reservation." This will be found upon reference to any map showing Indian Reservations in the United States, such as the maps attached to the Reports of the Commissioner of Indian Affairs for 1879 and 1880. The map thus attached inside of the front cover of the Report of the Commissioner of Indian Affairs for 1879, as on the other maps, includes, without any differentiation from the rest of the reservation, the lands added by the Executive order. There was no decision anywhere which indicated that the lands were not valid Indian lands. And ten years later even this Court in *Spaulding* v. *Chandler*, 160 U. S. 394, 402-403, expressed the opinion that "when Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of *title*, to wit, the right to possess and occupy the lands for the uses and purposes designated." (Italics added.) See also *Ex parte Wilson*, 140 U. S. 575, 577. The long-continued exercise by the Executive of the power on the public behalf of establishing Indian reservations by mere Executive order had been so long acquiesced in by Congress (until prohibited by Act of June 30, 1919, c. 4, 41 Stat. 3, 34, § 27, Title 43, U. S. C. § 150),[7a] that this Court regarded it in *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 472-473, as placing the validity of Executive orders beyond question. Cf. *Mason* v. *United States*, 260 U. S. 545, 553. Congress itself, by Act of May 29, 1830, c. 208, 4 Stat. 420, 421, § 4, in providing for the pre-emption of the public lands had said, "• • • nor shall the right of pre-emption, contemplated by this act, extend to any land, which is reserved from sale by act of Congress, *or by order of the President*, or which may have been appropriated, for any purpose whatsoever." (Italics added.)

[7a] This section provides, "no public lands of the United States shall be withdrawn by Executive order, proclamation, or otherwise, for or as an Indian reservation except by Act of Congess."

See also the Act of September 4, 1841, c. 16, 5 Stat. 453, 456, § 10. And the validity of such Executive orders was repeatedly adjudicated in cases involving all manner of rights in Executive-order reservations except those directly involving the rights of the Indians against the United States. See, generally, COHEN, *Handbook of Indian Law* (1942), pages 299-302.

From this, it is plain that in 1880 no one on the part of the United States could have supposed that the lands included within the Executive-order addition were not a part of the "present reservation" of the Utes. It cannot be assumed that the United States felt it was not acquiring this part of the reservation from the Indians. And it therefore will not do to say, as did the court below, that the United States had some nice appreciation of its own "title" and of the non-title of the Indians which caused it to speak in § 3 of the act of 1880, of lands not allotted "the title to which is * * * released and conveyed to the United States."

Sioux Tribe v. *United States*, 316 U. S. 317, itself is not authority for what respondent and the court below contend. In that case, the Court (316 U. S. at p. 326) after pointing out that the delegation to the Executive of the power of Congress to withdraw public lands from sale could be spelled out from long-continued congressional acquiescence in the executive practice, added: "The answer to whether a similar delegation occurred with respect to the power to convey a compensable interest in these lands to the Indians must be found in the available evidence of what consequences were thought by the executive and Congress to flow from the establishment of Executive order reservations." Applying that test, the Court found that the Executive and Congress had generally treated Executive order reservations as having a less certain and fixed tenure than those created by treaty or statute and as not having been intended to vest

the Indians with a title valid as against the United States; and that in particular the Sioux Executive order reservations had been so treated (316 U. S. at pp. 319-323). It concluded the Sioux reservations in question had been set up for a temporary purpose (that of handling the liquor traffic), without any intent on the part of the Executive and Congress to vest any permanent or compensable interest in the Sioux Tribe. In the present case, the President issued the Executive order for the purpose of settling the boundary dispute; to do so, he added the land to the reservation purposely that it might become incorporated in, be used for the same permanent purposes, and have the same status, as the other land already admittedly encompassed within the treaty boundaries. From 1875 to the time of the Act of 1880, it was never treated by the executive branch as having any different status than the other land. And when Congress passed the Act of 1880, it accepted this executive practice and made no differentiation as to the lands then embraced within the reservation. This was no situation, as in the *Sioux* case (316 U. S. at p. 320), where a mere temporary law-enforcement purpose was to be served, settlers retaining their rights within the Executive-order addition. Here, settlers were specifically excluded during (R. 32) the time the entire reservation remained in possession of petitioners, and thereafter (17 Op. Atty. Gen. 262) until specifically made available to settlement by Act of Congress (Act of July 28, 1882, c. 357, 22 Stat. 178, 1 Kappler 205)—which act preserved the rights of petitioners to have the lands sold and their proceeds held in trust. (The fact that in the *Sioux* case the agency buildings were outside the reservation, somewhat relied on by respondent in opposition to the petition for certiorari, Brf., p. 12-13, was purely coincidental: the Indians did not claim ownership of the land on which they were built, nor was the land set aside in settlement of any claim.) In hte *Sioux* case, the Indians were

confronted with their own cession of their lands in 1876 for a consideration which they had received (316 U. S. p. 323-324). Here the petitioners, under the Agreement of 1880, retained the beneficial interest in the proceeds of sale of the lands.

The 1880 act itself shows that Congress and the President treated this particular Executive order as giving the same title to the Indians as they had to their other lands. Congress canvassed the bill (S. 1509, 46th Cong., 2d Sess.) which became the Act of 1880 very thoroughly. House Report No. 1401, S. Exec. Doc. 114, Part 2, 46th Cong., 2d Sess., and the debates, June 1880, 10 Cong. Rec., Part 5, 46th Cong., 2d Sess. Nowhere did anyone draw any distinction between the Executive order and the other lands of petitioners. Thus, the act itself provides that the Indians shall be paid for their improvements—quite without respect to whether or not the improvements are located in the Executive order addition or elsewhere. And shortly after the agreement, the Attorney General by decision of January 17, 1882, held that despite the removal of the White River Utes from Colorado under the agreement, the reservation might not even then be disposed of by sales under the public land laws without additional legislation, since the allotments provided for by the agreement had not as yet been made. (17 Op. Atty. Gen. 262, 264.) Had anyone supposed that the United States owned the Executive order lands free of the trust provided for by the agreement, the executive officers of the government unquestionably would have so ruled—since it was in the area towards which prospectors and settlers were directing their most energetic attention. S. Exec. Doc. 29, 46th Cong., 2d Sess., pp. 41-43. The object of the Agreement of 1880 was settlement of the Indians in severalty and the giving up of the acreage required for their nomadic life, i. e., the acquisition by respondent of all of their lands not needed for allot-

ment. This object would not have been accomplished in its entirety if the Act of 1880 (the agreement) were interpreted so as to mean that petitioners, in addition to their right to individual allotments, had retained and not ceded, the approximately 600,000 acres of land embraced in the Executive order. Certainly, were the situation reversed, the United States would have properly ridiculed any contention of petitioners at the time that the agreement did not effect a cession of the Executive order lands along with the balance of the reservation.

In the court below and the brief in opposition in this Court (pages 15-16) some argument was made that the Agreement of 1880 cannot be regarded as intended by Congress to grant the Indians an advantage, because Congress was bent upon avenging the Meeker Massacre of 1879, its temper was to keep the Indians from payment of their money until the guilty ones were apprehended; and Congress did not intend to "gratuitously assume the burden petitioners contend for." There was nothing, of course, gratuitous about the deal which the United States made with petitioners in 1880. The United States achieved the purpose of its citizens to throw these lands with their rich minerals open to the white civilization. In return, the United States agreed not to profit in its capacity as a trustee from the transaction, but to pay the Indians just what the lands would bring after reimbursing the United States for its expenses and advances. If we grant that the Congress adopting the Act of 1880 was vindictive or vengeful (and if it were, it is hard to see how § 3 could have been agreed to by it at all), still that would only further confirm that Congress intended to include the Executive order lands within the cession by the Indians and to conclude all rights of petitioners in those lands. It cannot be seized upon to show that the trustee intended to make a secret profit at its ward's expense from the lands in question.

As to the Meeker Massacre itself, it is worth while to note that it is a rather plain case, so far as petitioners are concerned, and judged by standards of civilized nations, of justifiable warfare on their part. The Treaty of 1868 had solemnly promised exclusion of whites, it being provided (Article II) that—

> "* * * the United States now solemnly agree that no persons, except those herein authorized so to do, and except such officers, agents, and employes of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, except as herein otherwise provided." 15 Stat. 619, 620.

The treaty also (Art. VI) provided that if "bad men" among the whites should commit any wrong upon the property of the Indians, the United States would arrest and punish the offender and also reimburse the injured person for the loss sustained.[8]

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[8] Notwithstanding this guaranty, the Indian lands were being overrun both before and after the Meeker massacre. After Secretary of the Interior Carl Schurz, through the President, under date of May 25, 1880, had implored Congress to ratify the agreement of 1880, he sent a second communication to Congress stating that (Ex. Doc. 114, Part 2, Senate, 46th Congress, 2nd Sess.):

> "Collisions between persons, who, without authority, are invading the territory of the Ute Reservation in Colorado and the Ute Indians are evidently threatening; and it is to be feared that if hostilities now occur, even that part of the Ute Tribe which is most friendly to the government may be involved in them, under the impression that having made an agreement with them, and leaving it unacted upon, we have been acting in bad faith, merely desiring to deprive them of their lands without consideration.
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> "Speedy action upon the agreement in question seems, therefore, of the highest importance, and I beg leave to suggest that you commend once more this subject to the immediate attention of Congress."

With this communication he endorsed a letter of May 18, 1880 from Charles Adams, who had been Special Agent in the negotiation of the agreement of 1880. Mr. Adams, in part, said:

The massacre took place because the Indians thought their land was being invaded in violation of this solemn covenant. It had its inception in a dispute between the Indian Agent and a family of Indians as to whether certain land along the bank of a stream which was used by them for pasture for their horses should be plowed by the Agent for Agency purposes. Although the Indians were willing that the Agent could plow other land for his purposes, he insisted over their protests on plowing the land used by them.[9]

Following the protests, a warning shot was sent near the body of the plowman [10] Meeker, the agent at White River, called for support from the United States Army—but said nothing to the Indians about his request. When the Indians learned of the unexplained advance upon their terri-

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"The people of the State of Colorado, and thousands of adventurers and immigrants from other States, have made up their minds to explore, overrun, and possess these lands, and all the troops now in Colorado cannot keep them out, as it would be simply impossible to guard all the mountain passes. The Indians themselves consider that they have virtually given up their lands, and in case they derive no benefit thereby it will be only a question for them whether to accept the inevitable peaceably or retaliate by the only mode known to them—war in the most cruel and barbarous manner. They do not understand why a solemn agreement urged upon them and entered into with them by one branch of the government may be rejected by another branch, but much less do they understand why a matter which seemed so urgent and was considered as preventing a war two months ago has not been acted upon, and this delay and uncertainty suggests to their minds the idea that the government is using this delay to allow its soldiers and all others who wish to gain a firm foothold on the reservation, and then declare the agreement not approved, but hold the lands; and while still their chief Ouray and their agent can and do control them, a very few days may change the present status of affairs."

[9] Officially, the story is found in the Report of the Commissioner of Indian Affairs for 1879, pp. xviii to xxxviii; also in S. Doc. 27, 46th Cong., 2d Sess., *passim*.

[10] Compare the current civilized practice of firing a warning shot over the bow of an alien vessel invading territorial waters—as in the recent incident in the coastal waters of Albania.

tory and community of the troops, they considered it a hostile act of war. Meeker was so informed by the Indians [11] and conveyed to the commanding officer (Major Thornburgh) the Indians' request that the troops camp beyond the reservation, and that Major Thornburgh come in to the agency for a conference. In this request Meeker concurred. Notwithstanding the request, the troops persisted in their march to the reservation. Thereupon, hostilities commenced. Meeker and his male employees were slaughtered. Let Commissioner Manypenny tell the story (*Our Indian Wards* [1880], p. 432):

> "The news carried by the Indian runner to [Chief] Douglas' camp on the 29th of September that the troops and the Indians were fighting, was calculated to inflame the minds of the warriors who heard it. They had understood that Major Thornburgh would camp his troops, and come in to a conference, as they had suggested, and had shown symptoms of delight when this was told them. To have this good news not only dissipated, but to learn that a battle was going on, filled them with indignation. They realized that a deception had been practiced upon them, and believed that the agent and his employes were parties to it, and in their savage wrath they slew all of them. * * *"

Manypenny reports that General Sheridan announced that in default of the immediate surrender of the Indians committing the outrage, the Utes would be "exterminated"; while General Sherman, with no greater restraint, said that while they could not surrender up the twelve Indians participating in the massacre, if they did not do so "they must 'disappear from the face of the earth.'" *Id.*

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[11] As Meeker wrote at the time, "The Indians seem to consider the advance of the troops as a declaration of real war." Manypenny, *Our Indian Wards* (1880), p. 426.

Manypenny thus appraises the situation (*id.*, pp. 434-435):

"Among the crimes for which the general of the army holds the Utes responsible, is the killing of Maj. Thornburgh and such of his command as fell on the 29th of September, 1879. Let this matter be looked at calmly and impartially. Maj. Thornburgh was ordered to the Ute reservation, for the purpose of affording the agent assistance, and to make arrests at the agent's suggestion, and to hold as prisoners such Indians as might be indicated. He is advised by the agent, as he approaches, but before he reaches the boundary of the reservation, that the Indians desire him to stop and camp his troops, and come in with a few officers, to the agency, for a conference, and to this Mr. Meeker said he agreed. Maj. Thornburgh replied *that his orders from the general of the army were such that he could not comply.* He said he was, by his orders, required to march his command to the agency. The Indians had protested; they considered this an invasion of their country, a challenge to battle, an act of real war, and, as such, they accepted it. As Gen. Sherman was the author of the order, and Major Thornburgh, in attempting to execute it, did, in the opinion of his superior, 'exactly right,' it seems clear that the calamity came from the attempt to perform what was required by the order. If some discretion had been given to Maj. Thornburgh, and, in the exercise of this, he had complied with the request of the Indians, to which the agent agreed, and camped his troops before, or even soon after he had entered the reservation, every one will admit that no battle could have taken place between the Indians and the troops, and hence no occasion have arisen for the tragedy at the agency. In his testimony before the joint committee of the Forty-fifth Congress, Gen. Sherman admitted that a large discretion should be allowed in the Indian service. In his instructions to Maj. Thornburgh, his or-

ders were imperative, and that officer was in the line of his duty in attempting to execute them. Let the responsibility for the sad calamity at Milk creek, and the afflicting tragedy at White river agency, on September 29, 1879, rest upon the proper party."

Conclusion

Petitioners reasonably understood that they owned the Executive-order lands when they entered into the agreement of 1880 proposed by Congress. The United States, including Congress, knew of their understanding. There is no basis to believe but that the United States also thought petitioners owned or had "title" to the Executive-order lands; and the minds of the parties met on that view. In any event, the understanding of the Indians having been established, that understanding must prevail.

The parties having entered into a formal agreement, ratified by Congress, for the sale of all their reservation including the Executive-order lands, the case comes squarely within this Court's ruling in *Sioux Tribe* v. *United States*, 316 U. S. 317, 326, that:

> "• • • where lands have been reserved for the use and occupation of an Indian Tribe by the terms of a treaty or statute, the tribe must be compensated if the lands are subsequently taken from them. *Shoshone Tribe* v. *United States*, 299 U. S. 476; *United States* v. *Shoshone Tribe*, 304 U. S. 111; *United States* v. *Klamath Indians*, 304 U. S. 119."

And under *United States* v. *Alcea Band of Tillamooks, et al.*, decided November 25, 1946, No. 26 O. T. 1946, it would follow from both the opinion of the Chief Justice (pamphlet p. 11 to 12) and the dissent of Mr. Justice Reed (pamphlet p. 3) that where, as here, the United States has proceeded

in accordance with a recognition of a property right of the Indians, their property interest cannot thereafter be taken from them without just compensation.

The judgment below should be reversed.

Respectfully submitted,

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